DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

AEG
Docket No. 4566-98
22 February 2000

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD OF [redacted]

Ref: (a) 10 U.S.C. 1552

Encl: (1) Case Summary
(2) Subject's Naval Record

1. Pursuant to the provisions of reference (a), Petitioner, a former enlisted member of the Navy, applied to this Board requesting, in effect, that his naval record be corrected to show that he was not discharged on 13 September 1993 but continued to serve on active duty until the expiration of his enlistment on 11 January 1996. He further requests reenlistment in the Navy, special promotion consideration and addition of certain documentation to his naval record.

2. The Board, consisting of Messrs. Rothlein, Chapman and Morgan, reviewed Petitioner's allegations of error and injustice on 16 February 2000 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. Petitioner's application to the Board was filed in a timely manner.

c. On 11 January 1990, in exchange for a Selective Reenlistment Bonus, Petitioner reenlisted in the Navy for six years in the rate of fire controlman first class (FC1; E-6). At that time he had completed almost 24 years of active and reserve service. In January 1992 Petitioner reported for duty to the Superintendent of Shipbuilding, Pascagoula, MS, and was advanced to fire control chief petty officer (FCC; E-7).

d. On 13 February 1992, as a result of a tip from an informant and an ensuing search warrant, representatives of various federal and local law enforcement agencies searched Petitioner's residence and seized items including more than 80 pornographic magazines, approximately 12 of which depicted children. Petitioner stated that he had purchased the magazines while living in Europe because female companions found them exciting, and brought them back to the United States in 1986. Subsequently, the United States Attorney charged him with violating 18 U.S.C. § 2252, which prohibits the knowing possession of three or more books, magazines, films or video tapes which depict a minor engaging in sexually explicit conduct.

e. On 23 November 1992 the commanding officer (CO) initiated administrative separation action by reason of misconduct due to commission of a serious offense. On 1 December 1992 Petitioner elected to present his case to an administrative discharge board (ADB). The CO then referred him for a psychiatric evaluation and asked for specific comments on whether Petitioner had "pedophiliac tendencies" or a sexual orientation that posed a danger to his three-year old son. The evaluation was performed on 8 January 1993 by a psychiatrist at Naval Hospital, Pensacola, FL, Lieutenant (LT; O-3) B-K. In her report of 14 January 1993, LT B-K concluded that there was no evidence of pedophilia or other sexual orientation that might present a danger to a child. It appears that she reached this conclusion based solely upon her interview with Petitioner.

f. On 19 January 1993 an ADB met to consider Petitioner's case. The recorder to the ADB introduced documentary and testimonial evidence concerning the search and seizure of the pornographic material from his house. The recorder also introduced the evaluation of LT B-K as government exhibit 10 to the ADB proceedings. Petitioner's counsel introduced two evaluations. One of these evaluations, respondent's exhibit 4, is a letter from a clinical social worker, Ms. S, which stated that Petitioner and his wife had completed marital therapy with her.

g. Respondent's exhibit 2 is a letter and affidavit from a clinical psychologist, Dr. (Ed.D) S, concerning the results of a detailed psychosexual evaluation on Petitioner, performed on 18 June and 7 July 1992. In addition to recording an extensive history, DR S administered three tests to Petitioner, which he stated "were within normal limits," and "produced a valid profile, which did not match known clinical portraits or profiles." Dr. S also commented as follows concerning one of these tests:

> (Petitioner) provided informed consent to become involved in penile plethysmography, a laboratory-based method for measuring sexual arousal. In this procedure, changes in penile tumescence are measured by a strain-gauge and physiological chart recorder. (Petitioner's) responses to

audiovisual stimuli, depicting males and females across the age spectrum, indicated that he has a typical adult heterosexual arousal pattern with interest in adult females. There was no evidence of sexual interest in children.

Dr. S stated that "I do not believe (Petitioner) is a pedophile," and set forth the following impressions:

> . . . (Petitioner) does have some sexual problems. I would speculate that he has developed some preference for masturbation, which is a "convenient" form of sexual outlet, allowing perception of control and reducing the requirement of social and emotional investment in a partner. It is likely that he uses some pornographic materials and women's underwear for stimulation during masturbation. He does not fit the typical portrait of someone who would be involved in child pornography.
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> Before I could render a strong opinion about the likelihood of involvement with child pornography, I would like to gather additional data. If my impressions are to become a significant factor in this case, I would want to view his various collections and writing projects in order to estimate the true extent of his involvement as well as his motives. It may be possible to explain his possession of child pornography as a manifestation of compulsive traits.

In his affidavit, Dr. S opined that "within a reasonable degree of clinical certainty, . . . (Petitioner) is not a pedophile and further, (he) is an adult heterosexual with an interest in adult females, there is no evidence of any sexual interest in children." Dr. S also submitted his curriculum vitae (CV), which shows his experience in treating and evaluating sexual offenders.

h. Petitioner testified at the ADB, in part, as follows concerning his possession of the child pornography:

> I bought the child pornography magazines in Europe between 1981 and 1984, which at that time I thought they were legally purchased. I bought the books when I was a civilian in Germany. I traded a lot of magazines with my German friends. I used the magazines as ice breakers. I have never purchased a child pornography book since the purchase of these books. I brought the magazines back to the States in March 1986 . . .
>
> I did purchase the magazines overseas and I did bring them back into the United States, and at least three of the publications show minors engaged in sexually explicit conduct.

i. After deliberating for about two hours, the ADB announced a unanimous finding that Petitioner had committed misconduct due

to a serious offense as alleged, but also unanimously recommended his retention in the Navy.

j. On 1 April 1993 the CO submitted the case to the Chief of Naval Personnel (CNP). In this regard, the CO should have forwarded the transcript of the ADB proceedings along with all of the exhibits introduced by the recorder and Petitioner's counsel. In his forwarding letter the CO stated, in part, as follows:

> . . . I concur with the findings of the (ADB); however, I do not concur with the . . . recommendation that (Petitioner) be retained in the Naval service. Because of his outstanding performance, the final assessment of his fitness for duty should be determined after a full examination by the National Naval Medical Center at Bethesda.
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> Contrary to the (ADB's) recommendation, I have doubts about (Petitioner's) capacity to continue in the leadership role as a Chief Petty Officer. The evidence calls into question character and conduct that are not conducive to good order and discipline that could end up being a discredit to the naval service. He is still pending trial for shipping and possessing child pornography. In my judgment, his background indicates an individual who has clearly exhibited dysfunctional behavior: sexual, in social relationships, and parenting in his family setting . . .
>
> The supporting evidence on this behalf boils down to "he does a good job for the Navy." For a Chief Petty Officer, I do not believe this is good enough to recommend retention in light of the serious misconduct and his account of how and why he obtained the material. I have serious reservations about his judgment and leadership. However, I am willing to concede to a cautionary recommendation of retention provided (Petitioner) is cleared for psychiatric stability and future naval service by a competent Navy medical board with expertise in evaluating the social disorders that appear to me to plague (him).

k. After the case was received in the Enlisted Performance Division (Pers-83) of the Bureau of Naval Personnel (BUPERS), it was decided that input from the Family Advocacy Section (Pers-661) of BUPERS would be helpful. In response to the request of Pers-83, the Head of the Child Sexual Abuse Case Management Unit (Pers-661D) submitted a memorandum dated 13 July 1993 which reads as follows:

> This office has reviewed the (ADB) proceedings and determined that although there are no allegations of child sexual abuse, the dependent child of (Petitioner) is considered "At Risk" for sexual abuse based on the amount of child pornography and other pornographic material in the home that the child has been exposed to.

> The psychiatric *evaluation* submitted on (Petitioner) was not a psychosexual evaluation and did not include any testing to objectively determine (his) sexual deviancy. (emphasis supplied)
>
> As (Petitioner) has already been found to have committed misconduct, this office does not recommend that (he) be retained in (the) Naval Service.

This memorandum was never submitted to Petitioner or his military counsel for comment.

l. On 11 August 1993, while his case was still under review in BUPERS, Petitioner entered into a deferred prosecution agreement with the United States Attorney pending completion of a pretrial diversion program. Successful completion would result in dismissal of the charge. The command advised CNP of this development. On 17 August 1993 CNP submitted the case file to the Secretary of the Navy (SECNAV) recommending that Petitioner be discharged despite the contrary recommendation of the ADB. In his forwarding letter CNP cited Petitioner's collection, possession and transportation of child pornography and his admission to cross-dressing, and then stated as follows:

> While it is unusual to consider information that was not available to the (ADB), the input of the Family Advocacy Program (FAP) was deemed appropriate . . . (The FAP) memo dtd 13 Jul 93, does not recommend retention of (Petitioner) and classified the dependent child as "at risk" in the household. Additionally, . . . on 5 May 93 (Petitioner) entered into a deferred prosecution agreement with Pascagoula, MS Southern District Court for possession of child pornography that has been shipped in interstate commerce, an action equivalent to a finding of guilty. The sheer amount of pornography held by (Petitioner) is shocking. (He), as a senior enlisted member, does not meet the high standards of conduct required of a role model for younger sailors. His actions and proclivities are inconsistent with Naval policies and his continued service is unnecessary and highly undesirable. Therefore, the recommendation by the (ADB) for his retention must be rejected.

m. On 25 August 1993 the Assistant Secretary of the Navy for Manpower and Reserve Affairs (ASN/M&RA), acting for SECNAV, approved CNP's recommendation and directed a general discharge by reason of misconduct. The command was advised of this action by message of 30 August 1993 and Petitioner was so discharged on 13 September 1993 after about 15 years and 10 months of active service and over 27 years of total service. On that date, an enlisted performance evaluation was prepared for the period 1 October 1992 through 13 September 1993 which assigned a marginal mark of 3.0 in personal behavior and stated "this evaluation is

being submitted upon (Petitioner's) discharge from the Naval Service."

n. Petitioner first applied to the Board in October 1994, requesting that his discharge be set aside or, in the alternative, a change in the characterization of service to honorable and retirement under the Temporary Early Retirement Authority. He contended that he did not violate 18 U.S.C. § 2252 and that since he was separated by reason of secretarial plenary authority, the Naval Military Personnel Manual (MILPERSMAN) required that he be afforded an opportunity to comment before CNP made the recommendation for separation to ASN/M&RA. Petitioner was then unaware of the existence of the 13 July 1993 memorandum from Pers-661D. In preparing Petitioner's case for presentation to the Board, a staff member requested that Petitioner's last command provide a complete copy of the ADB proceedings. The package submitted by the command contained the transcript of the ADB and all exhibits. The Board also received a copy of Petitioner's microfiche record. On 14 March 1995 the Board denied Petitioner's application.

o. After Petitioner's request for reconsideration was received in June 1998, a member of the Board's staff discovered that the microfiche record provided by BUPERS in connection with the initial review of the case did not contain respondent's exhibits 2 and 4, the letter of Ms. S and the letter and affidavit of Dr. S. The microfiche record did contain government exhibit 10, the evaluation performed by LT B-K.

p. In an attachment and a supplement to the most recent application, Petitioner's counsel notes the absence of the two ADB exhibits from the copy of the ADB on the microfiche, and alleges that these documents were not considered by the reviewing authorities. Counsel contends that the Navy violated the MILPERSMAN by considering the Pers-661D memorandum since it was never referred to Petitioner for review and comment prior to the decision of ASN/M&RA to direct discharge. Counsel further avers that such *ex parte* consideration of the memorandum violated his client's right to due process of law. Counsel has also submitted letters of 30 January and 1 August 1997 from a psychiatrist, Dr. C, who examined Petitioner and concurs with the earlier evaluation by Dr. S, who has submitted a letter of 1 November 1997 in which he adheres to his earlier opinion.

q. Pers-661 was asked to provide an advisory opinion concerning its apparent failure to consider the evaluations of Ms. S and Dr. S, and to comment on the evaluation from Dr. C. The Pers-661 response of 1 December 1998 reads, in part, as follows:

> The defense exhibits . . . missing from Petitioner's record . . . were reviewed as part of the (ADB) package submitted by Pers-83. (Dr. S's) evaluation summarized that (Petitioner) had no interest in children and had a "typical

arousal pattern with interest in adult females." This evaluation was based on a Minnesota Multiphasic Personality Inventory (MMPI), a Penile Plethysmograph Test (PPT) and interviews with (Petitioner) and his spouse. Psychosexual evaluations cannot determine whether an individual has or will molest children. (Dr. S) stated, however, that (Petitioner) had sexual problems and recommended marital counseling with emphasis on the couple's sexual relationship. The letter from (Ms. S) failed to specify any treatment goals or the progress made and there was no indication that the sexual problems were addressed.

The psychiatric evaluation . . . by (Dr. C) does not provide any additional information that would change the conclusion or recommendation of this office. (Dr. C), as evidenced by his (CV), does not have any specialized training in treating and evaluating sex offenders.

. . . No one can predict with certainty whether an individual will or will not molest a child, but risk factors can be identified. (Petitioner) has a pattern of behaviors including dysfunctional sexual relationships with a spouse, social isolation, lack of judgment, long term possession of child pornography, and obsessive/compulsive traits which have been identified (from known sex offenders) as risk factors for child molestation. There are no behavioral or personality disorder profiles which can consistently identify or rule out a sex offender. An individual does not necessarily have to be diagnosed as a Pedophile to be at risk for child molestation.

(T)he discharge of (Petitioner) was appropriate and the information contained in (the foregoing) exhibits does not alter the recommendation made on 13 July 1993.

In separate but related comments dated 11 January 1999, Pers-83 states that adding the letters of Dr. S and Ms. S to Petitioner's record would be unobjectionable, but otherwise recommends against corrective action. Attached to these comments was a copy of documentation forwarding the letters for inclusion in Petitioner's record, thus granting one of Petitioner's requests without the need for action by the Board.

r. The Navy Personnel Command's Office of Legal Counsel (Pers-06L) was asked to provide comments concerning the failure to submit the Pers-661D memorandum of 13 July 1993 to Petitioner or his counsel. In an advisory opinion of 26 January 1999, Pers-06L replied, in part, as follows:

The gravamen of Petitioner's complaint is the failure of two exhibits, entered into the record . . . at the (ADB), to be permanently entered into the microfiche record . . . (I)t is the hard, or paper, record that is relied upon at every level of review. It alone, and not the microfiche

> record, forms the basis of the final decision by (ASN/M&RA). The paper record is then sent for microfilming and permanent storage. Petitioner presents no evidence that the missing exhibits were not reviewed by (ASN/M&RA) when making his decision to separate him. Petitioner merely assumes that the documents were not seen by (ASN/M&RA), but cannot prove this.

Pers-06L then notes that the record contains sufficient evidence to justify separation, given Petitioner's admission to committing the offense as alleged and the documentary evidence introduced at the ADB. Pers-06L then noted the CO's ambivalent comments in his forwarding letter and CNP's recommendation for separation, and concludes as follows:

> Petitioner's conduct was reason alone for (ASN/M&RA) to separate him from the Navy . . . BUPERS asked (ASN/M&RA) to separate Petitioner, not because his misconduct proved him incapable of future service, but because his misconduct proved him incapable of future service. Any deficiencies in the record would not have altered this decision.

s. Petitioner's counsel submitted letters dated 10 August and 29 December 1999 in response to the advisory opinions in which he reiterates his earlier contentions and further contends that the opinions now denigrate the sort of testing which was deemed necessary prior to CNP's recommendation for discharge. Counsel also argues out that Dr. S's 1992 evaluation was not rebutted at the ADB, and asserts that Dr. C's CV indicates he is competent to express the opinion set forth in his letter to the Board. Counsel also submitted a rebuttal to the advisory opinion prepared by Dr. C, and a letter from Dr. S to the effect that Dr. C is qualified to render an opinion in the case. Counsel also points out that contrary to the comments in the Pers-06L advisory opinion, the issue in Petitioner's case is not whether sufficient evidence existed to separate Petitioner, but whether he *should* be separated. Counsel argues that when viewed in this light, the missing exhibits were crucial to a fair resolution of the case. Counsel also requested the CV's of the individuals who prepared the Pers-661 advisory opinion, and the two clinical psychologists who provided input for the opinion complied with this request.

t. On 7 September 1999, due to the imminent expiration of the applicable statute of limitations, Petitioner filed suit in the United States Court of Federal Claims. However, the proceedings were subsequently stayed pending final action on his case before the Board.

u. At the time of Petitioner's separation, MILPERSMAN Article 3640350.6a stated that the record of proceedings of an ADB consists of "the facts and circumstances accompanied by supporting documents." Article 3640370.7 indicated that the record of proceedings forwarded by the CO to CNP includes a summarized transcript, the government and defense exhibits, any

other documentation considered by the ADB, and the report of the ADB. Article 3640370.1b(2) stated that one of CNP's options in a case such as Petitioner's was to recommend that SECNAV separate the individual, notwithstanding the ADB's recommendation for retention, "for one of the specific reasons which the (ADB) found supported by the preponderance of the evidence of record relied upon in reaching its conclusion." Article 3610260.8e(3) made it clear that SECNAV could consider recommendations from any authorized source with "specialized training, duties and experience . . . on the issue of separation or retention." The MILPERSMAN does not specifically authorize a separation authority such as CNP or ASN/M&RA to consider evidence outside the ADB record of proceedings.

v. It is now well settled that courts will review cases in which it is alleged that the military violated the Constitution, or applicable statutes or regulations. *Harmon v. Brucker*, 355 U.S. 579 (1958); *Dilley v. Alexander*, 603 F.2d 914, 920 (D.C. Cir. 1979). Regulations issued by the services are binding on them and must be followed. *White v. Calloway*, 501 F.2d 672 (5th Cir. 1974); *Casey v. United States*, 8 Cl.Ct. 234 (1985). Concerning post-ADB evidence, a recent case held that the discharge authority could consider such evidence. However, the court noted that the Air Force complied with a regulation that required, prior to separation authority action, notification to the individual and an opportunity to comment on the evidence. *Marin v. United States*, 41 Fed.Cl. 129 (1998).

w. If an individual has a liberty or property interest in continued employment, he or she is entitled to due process of law under the Fifth Amendment to the Constitution before the employment may be terminated. *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972). A property right exists only if the individual has a legitimate claim of entitlement to continued employment. *Id.* at 577. A liberty interest is implicated if an individual's reputation or integrity is threatened by the adverse action, or if that action may adversely affect the freedom to take advantage of other employment opportunities. *Id*, at 573-74. Most courts have held that enlisted servicemembers do not have a property interest in continued service. *Guerra v. Scruggs*, 942 F.2d 270, 278 (4th Cir. 1991); *Canonica v. United States*, 41 Fed.Cl. 516, 524 (1998). However, one court has stated that the statute authorizing enlisted administrative separations, 10 U.S.C. § 1169, elevates the requirement that the services follow their own regulations into a limited property right. *Perez v. United States*, 850 F.Supp. 1354, 1362 (N.D.Ill. 1994). Courts have also stated that military members have a liberty interest requiring due process, if the discharge at issue is stigmatizing. *Vierrether v. United States*, 27 Fed.Cl. 357, 364-65 (1992), *aff'd without op.*, 6 F.3d 786 (Fed.Cir. 1993), *cert. denied*, 511 U.S. 1030 (1994); *Canonica, supra*. Such a stigma may result from a general discharge. *Casey v. United States, supra*, at 242-43; *Guerra*, at 278; *Weaver v. United States*, No. 99-179C (Fed.Cl. Feb. 7, 1999). However, some courts have held that merely having

a liberty interest does not make out a due process violation; the individual must allege falsity in the asserted basis for the adverse employment action. Accordingly, a servicemember must allege that the reason for discharge is false. *Doe v. Garrett*, 903 F.2d 1455, 1462-63 (11th Cir. 1990); *Guerra*, at 278-79. At least one court declined to so hold, concluding only that the administrative discharge action at issue did not "violate the fundamental protections of the Constitution." *Holley v. United States*, 124 F.3d 1462, 1469 (Fed. Cir. 1997).

x. Federal courts have consistently held that if an individual has a right to due process of law, the right is violated and an administrative action will be invalidated if an adversary engages in an *ex parte* communication with the decision maker in that action. *Camero v. United States*, 375 F.2d 777 (Ct.Cl. 1967); *Ryder v. United States*, 585 F.2d 482 (Ct.Cl. 1978); *Fitzgerald v. United States*, 623 F.2d (Ct.Cl. 1980). However, this prohibition does not apply to "internal documents of an advisory nature." *Sullivan v. United States*, 720 F.2d 1266, 1272 (Fed.Cir. 1983). In this regard, courts have long held that a decision maker may rely on subordinates to analyze the record and prepare recommendations. *Morgan v. United States*, 298 U.S. 468, 481-82 (1936) [*Morgan I*]; *Braniff Airways, Incorporated v. C.A.B.*, 379 F.2d 453 (D.C. Cir. 1967); *K.F.C. National Management Corp. v. N.L.R.B.*, 497 F.2d 298 (2nd Cir. 1974). However, another fundamental tenet of administrative law states that an individual must be afforded an opportunity to meet and rebut evidence used against him by an administrative agency. *Morgan v. United States*, 304 U.S. 1 (1938) [*Morgan II*]; *Ralpho v. Bell*, 509 F.2d 607, 628 (D.C. Cir. 1977); *Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 1048 (6th Cir. 1990).

y. In *Doe v. Hampton*, 566 F.2d 265 (D.C. Cir. 1977), an individual was recommended for separation from the federal service based, in part, on an adverse psychiatric evaluation. The employee then obtained another evaluation that recommended treatment and retention on the job. However, the employee was terminated and she appealed to the Civil Service Commission (CSC). In deciding her case, CSC obtained a third opinion from a doctor who examined the employee's record and made ambivalent comments. In deciding the case, the court stated that the cases condemning *ex parte* communications were inapplicable since the third doctor was not an adversary in the case or allied with such a party, but instead "had a neutral stake in the outcome of the appeal." *Id.* at 276. However, the court also said that the doctor's input could not be regarded as merely the use of an assistant as sanctioned by *Morgan I* and *Brannif*, both *supra*, but "must be viewed as essentially the introduction of further medical opinion evidence into the record . . . " *Doe*, at 276. The court then stated it was improper for CSC to consider the opinion of the third doctor, but based this conclusion on the failure of CSC to follow its own regulations and not on general due process grounds. However, the court then declined to grant relief, holding that even though consideration of the undisclosed

additional medical opinion was erroneous, the error was not prejudicial since "in effect the evidence thusly generated was merely cumulative." *Id.* at 276-77.

z. 10 U.S.C. § 6330 states that an individual may be transferred to the Fleet Reserve after 20 years of active military service. 10 U.S.C. § 1176(a) states that a regular enlisted member who is denied reenlistment at the expiration of enlistment, and is within two years of qualifying for transfer at that time, must be retained on active duty until he or she is qualified for transfer. 10 U.S.C. § 6331 states that a member of the Fleet Reserve is entitled to be transferred to the retired list upon attaining 30 years of combined active and reserve service.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concludes that Petitioner's request warrants favorable action. The Board believes that since the Pers-661D memorandum of 13 July 1993 was never referred to Petitioner for comment, CNP improperly and prejudicially referenced the memorandum in the letter to SECNAV of 17 August 1993.

The Board begins its analysis by carefully examining the Pers-661D memorandum in order to determine whether it should be viewed as new evidence not considered by the ADB or, on the other hand, only as a recommendation to the decision makers in Petitioner's case. The Board first notes that the memorandum references a psychiatric evaluation in the ADB record of proceedings that is favorable to Petitioner, apparently referring to the evaluation performed by LT B-K. Pers-661D properly comments that it was not a psychosexual evaluation and he was not tested for sexual deviancy. However, the memorandum then goes on to take issue with LT B-K's conclusion that Petitioner posed no threat to his young son. In so doing, the Board believes Pers-661D provided another forensic evaluation for consideration by Pers-83, CNP and the ultimate decision-maker, ASN/M&RA. Along these lines, the Board is aware that clinical psychologists serve in Pers-661, and believés they certainly would have provided input to the author of the memorandum, just as they did in the preparation of the Pers-661 advisory opinion to the Board. Accordingly, the Board likens this case to *Doe, supra*, and concludes that the memorandum of Pers-661D cannot be considered as a recommendation but must be viewed as further medical opinion evidence.

The Board also believes that even if the 13 July 1993 memorandum constituted new evidence, it could be taken into consideration without violating those provisions of the MILPERSMAN pertaining to an ADB's record of proceedings and the authorized actions of CNP and SECNAV once an ADB is completed. Unlike the CSC regulation set forth in *Doe, supra,* the MILPERSMAN does not prohibit reviewing authorities from considering post-ADB evidence, but is silent on the subject. The Board realizes that

such evidence will occasionally come to light, and believes that all reviewing authorities should have the authority to consider it. The Board tangentially notes that although the post-ADB evidence in Petitioner's case was unfavorable to him, evidence favorable to the respondent may come to light in other cases. The problem in Petitioner's case was not that the Per-661D memorandum was considered, but the lack of procedural safeguards surrounding that consideration.

Along these lines, the Board first concludes that Petitioner was entitled to due process of law. Petitioner's general discharge by reason of misconduct clearly implicated a liberty interest. The Board is also aware, however, that he was discharged by reason of misconduct due to commission of a serious offense, a violation of 18 U.S.C. § 2252. He did not allege that he was falsely accused at the ADB, and does not so allege now. Accordingly, one could conclude that no due process violation occurred. However, the real issue in his case was not whether he violated the law, but whether that violation warranted his discharge. Accordingly, the Board believes that he had a fundamental right to notice and an opportunity to respond not only to evidence of his violation of the law but to all evidence, such as the Pers-661D memorandum, which could be used to support his discharge. Courts have agreed, stating that "an opportunity to meet and rebut evidence utilized by an administrative agency has long been regarded as a primary requisite of due process." *Ralpho v. Bell, supra.*

Counsel's contention that the Pers-661D memorandum constitutes the sort of *ex parte* communication prohibited by *Camero v. United States, supra,* and its progeny appears to be slightly off the mark. Pers-661D was not an adversary in the administrative separation process, but submitted the memorandum as the sort of internal working document envisioned by *Sullivan v. United States, supra.* However, as previously noted, this memorandum did not just comment on the record but supplemented it by providing new evidence. Thus, the memorandum was not covered by the line of cases beginning with *Morgan I, supra,* that permit subordinates to analyze a record and make recommendations to the decision maker. Given *Morgan II, supra,* and later cases in accord with that decision, it was improper for ASN/M&RA to consider the memorandum without first referring it to Petitioner and providing him with an opportunity to comment.

It is a basic principle of administrative law that an action will not be invalidated unless prejudicial error is present, and harmless error will not result in reversal. However, an error may be deemed harmless only if the reviewer is convinced that it did not influence the decision, or had only a very slight effect. *Kotteakos v. United States,* 328 U.S. 750 (1946); *United States v. Environmental Protection Agency,* 595 F.2d 207 (5th Cir. 1979). After a careful review of the facts and circumstances in light of this standard, the Board believes the error in this case was prejudicial.

In coming to this conclusion, the Board again notes that to all intents and purposes, the sole issue in Petitioner's case was not whether sufficient grounds existed to discharge him, but whether he should, in fact, be discharged. The ADB, after carefully considering the case, answered this question in the negative. This favorable outcome was understandable. At that time, he had performed many years of good and faithful service on active duty and in the reserves. His offense in the civil community cannot be classified as minor, but he was charged only with possession of child pornography, and not with trafficking of such material. Additionally, the medical evidence considered by the ADB, the evaluations by Ms. S, Dr. S and LT B-K, was favorable to him. The Board believes that the very thorough evaluation by Dr. S must have been a key factor in the ADB's favorable recommendation. As shown by his forwarding letter to CNP, the CO was ambivalent on the issue of retention. Even Pers-83 obviously was undecided, since that office solicited input from Pers-661D. The resolution of the civil case, which did not occur until after the ADB, may also be viewed as favorable to Petitioner since he did not face judicial action but was permitted to enter into a pre-trial diversion program.

Accordingly, much of the information in the record submitted to CNP supported the ADB's recommendation for retention. Further, prior to the Pers-661D memorandum, no one in authority had unequivocally recommended that Petitioner be discharged. It is therefore clear to the Board that contrary to the advisory opinion of Pers-06L, the memorandum was a significant factor in the outcome of the case, especially since CNP highlighted it in the letter to SECNAV recommending Petitioner's discharge. Along these lines, the Board believes the memorandum would have been viewed as credible by reviewers, given the qualifications of the individuals serving in Pers-661. And unlike the input provided in *Doe, supra*, the memorandum clearly came to a straightforward conclusion and recommended a specific course of action--the amount of pornography discovered meant that Petitioner was a threat to his son's well-being, and he should be separated. It bears repeating that until the input of Pers-661D, the only evaluations in the record, from LT B-K, Dr. S and Ms. S, were all favorable to him.

It is also extremely significant to the Board that the Pers-661D memorandum either misrepresented the record or was prepared on the basis of an incomplete record. Contrary to the position of both advisory opinions, it appears that the favorable evaluations of Dr. S and Ms. S simply were not forwarded with the remainder of the ADB's record of proceedings, or were misplaced prior to the review by Pers-661D. Along these lines, the memorandum states that there was only one non-psychosexual evaluation in the record, apparently referring to the evaluation by LT B-K. However, the record actually contained three evaluations, and one of them was the psychosexual evaluation of Dr. S. If, on the other hand, Pers-661D reviewed a complete record, by failing to

address the favorable psychosexual evaluation of Dr. S its memorandum presented an incomplete and misleading picture of the ADB's record of proceedings. Whether the record was misrepresented or incomplete, CNP compounded the problem in its 17 August 1993 letter to SECNAV by referencing the input from Pers-661D and concurring with it. Given the other material in the record which supported the ADB's recommendation for retention, it is far from clear that ASN/M&RA would have directed Petitioner's discharge if she had been aware of the favorable evaluations of Dr. S and Ms. S, especially the former.

The Board also concludes that even if it was constitutionally unobjectionable to consider the Pers-661D memorandum without referring it to Petitioner, such consideration was unfair and constituted an injustice to Petitioner. As a senior enlisted servicemember with many years of active and reserve service, as a matter of fairness and equity he should have been permitted to respond to the memorandum prior to the action of the discharge authority. This is especially true given the ADB's recommendation for retention and the inaccurate statements in the memorandum.

Having found both prejudicial error and an injustice in Petitioner's discharge, the Board then turned its attention to determining the appropriate relief. It is clear that no individual has a right to enlist or reenlist in the armed forces. *Land v. United States*, 41 Fed.Cl. 695 (1998). Accordingly, if a discharge is found to be improper or unjust, and the last period of obligated service has expired, correcting the record to show completion of the last period of service is normally all that is required. *Bray v. United States*, 515 F.2d 1383 (Ct.Cl. 1975); *Thomas v. United States*, 42 Fed.Cl. 449 (1998). Since Petitioner reenlisted for the last time on 11 January 1990 for six years, a correction to show that he served until 10 January 1996 would normally be sufficient. However, by that time Petitioner would have accrued over 18 years of active service and fallen within the "safety zone" set forth in 10 U.S.C. § 1176(a). Since he would have been entitled to extend his enlistment at that time to accrue 20 years of active service, the record should also be corrected to show that he extended his enlistment and then transferred to the Fleet Reserve when first eligible. Taking only his periods of extended active duty into account, it appears from the record that this date would be 3 November 1997. However, during his service as a drilling reservist, Petitioner accrued about three months of active duty for training, at least part of which is creditable for active duty retirement. Additionally, given his many years of service in the Naval Reserve, it appears that he would be eligible for transfer to the retired list almost immediately after transfer to the Fleet Reserve. In any case, the Board is content to allow the Navy Personnel Command to determine the exact dates of transfer to the Fleet Reserve and the retired list.

The Board notes Petitioner's request for special promotion consideration. However, he was never selected for advancement, and does not believe that he would have been so advanced, given his discreditable involvement in the civilian community. Accordingly, the Board believes this request has no merit and should be denied.

In view of the foregoing, the Board finds the existence of an error warranting the following corrective action.

RECOMMENDATION:

a. That Petitioner's naval record be corrected to show that he was not discharged on 13 September 1993 but continued to serve without interruption on active duty. This corrective action should include the following:

1. Removal of ASN/M&RA's signature, dated 25 August 1993, from the CNP memorandum of 17 August 1993.

2. Removal from the record of the BUPERS message of 30 August 1993 directing Petitioner's discharge.

3. Removal from the record of the enlisted performance evaluation for the period 1 October 1992 to 13 September 1993.

4. Removal from the record of the DD Form 214 dated 13 September 1993.

b. That the record further be corrected to show that on 9 January 1996 Petitioner extended his enlistment for a period of two years, continued to serve on active duty until the date he first became eligible for transfer to the Fleet Reserve and, on that date, was so transferred.

c. That the record be further corrected to show that after being transferred to the Fleet Reserve, Petitioner was transferred to the retired list on the date he first became eligible for such transfer.

d. That no further relief be granted.

e. That any material or entries inconsistent with or relating to the Board's recommendation be corrected, removed or completely expunged from Petitioner's record and that no such entries or material be added to the record in the future.

f. That any material directed to be removed from Petitioner's naval record be returned to the Board, together with this Report of Proceedings, for retention in a confidential file maintained for such purpose, with no cross reference being made a part of Petitioner's naval record.

4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN
Recorder

ALAN E. GOLDSMITH
Acting Recorder

5. The foregoing action of the Board is submitted for your review and action.

W. DEAN PFEIFFER

Reviewed and approved:

APR 5 2000

Charles L. Tompkins
Deputy Assistant Secretary of the Navy
(Personnel Programs)